IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CITY OF PHILADELPHIA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 05-4391
HOTELS.COM, et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **OCTOBER 11, 2005**

Presently before this Court is Plaintiff's Motion for Remand to the Court of Common Pleas of Philadelphia County pursuant to 28 U.S.C. § 1447(c). For the reasons discussed below, Plaintiff's Motion is granted.

I. FACTUAL BACKGROUND

Plaintiff's Complaint alleges that all of the Defendants are online travel agents and online sellers and resellers that have rented and/or sold hotel rooms to the general public in the City of Philadelphia and have collected taxes in connection with those rooms, but failed to remit the full amount of hotel room rental taxes to the City of Philadelphia as required by the Philadelphia Municipal Code. According to Plaintiff, the Defendants contracted with hotels for rooms at negotiated discounted room rates. Defendants then marked up the prices of the rooms and sold the rooms to the public, who actually occupied the rooms. Defendants charged and collected taxes from occupants based upon the marked up room rates, but only remitted tax amounts based upon the lower, negotiated room rates to the hotels, who then remitted these

lower tax amounts to the City of Philadelphia.

As alleged by the Complaint, these practices are in direct contravention of Philadelphia's Hotel Room Rental Tax, Chapter 19-2400, which imposes a 7% tax "on consideration received . . . from each transaction of renting a room . . . ." Phila. Code § 19-2402(1). Consideration is defined as "[r]eceipts, fees, charges, rentals, leases, cash, credit, property of any kind or nature, or other payment received by operators in exchange for or in consideration of the use or occupancy by a transient of a room or rooms in a hotel for any temporary period." Phila. Code § 19-2401(2). According to the Complaint, this definition of consideration means that the entire amounts paid by hotel occupants to Defendants are subject to the hotel tax. Based upon these facts, Plaintiff alleges violations of the City of Philadelphia's Hotel Room Rental Tax, as well as conversion, and Plaintiff seeks the imposition of a constructive trust and demands a legal accounting.

II. PROCEDURAL BACKGROUND

Plaintiff filed a civil action in the Philadelphia Court of Common Pleas on or about July 12, 2005. (July Term, 2005, No. 000860). The civil action in the Philadelphia Court of Common Pleas was against the following seventeen Defendants: Hotels.com; Hotels.com GP, LLC: Hotwire.com; Cheap Tickets, Inc.; Cendant Travel Distribution Services Group, Inc.; Expedia, Inc.; Internetwork Publishing Corp. (d/b/a/ Lodging.com); Lowestfare.com, Inc.; Orbitz, Inc.; Orbitz, LLC; priceline.com, Inc.; Site59.com, LLC; Travelocity.com, Inc.; Travelocity.com, L.P.; Travelweb, LLC; Travelnow.com, Inc. ("Removing Defendants"); and Maupintour Holding, LLC ("Maupintour Holding"). On August 17, 2005, all of the Defendants, except for Maupintour Holding, filed a Notice of Removal of this action to this Court based upon

diversity of citizenship.[1] *See* 28 U.S.C. § 1332(a). In their Notice of Removal, Removing Defendants state that "[a]ll Defendants named in Plaintiff's Complaint except Maupintour Holding, LLC join in this Notice of Removal. Maupintour Holding, LLC is not required to join in this Notice because it was improperly and fraudulently joined in the removed action." (Not. Removal ¶ 16).

Plaintiff argues that the Notice of Removal is defective on its face because "[u]nder the law, a Notice of Removal must be joined in or consented to by all defendants named in the action. Here, defendant Maupintour Holding, LLC has not joined in the removal."[2] (Pl.'s Mem. Law Support Mot. Remand at 2). Based upon this argument, Plaintiff filed its Motion for Remand on September 12, 2005 arguing that the Notice of Removal is procedurally defective.

III. DISCUSSION

"[T]he removal statute should be strictly construed and all doubts should be resolved in favor of remand." Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985). 28 U.S.C. § 1447(c) provides for remand on the basis of a procedural defect. *See* 28 U.S.C. § 1447(c). The Removing Defendants petitioned for removal pursuant to 28 U.S.C. 1446(a) which requires that "[a] defendant or defendants desiring to remove any civil action . . . shall file . . . a notice of removal . . . ." 28 U.S.C. § 1446(a). "Despite the ambiguity of the term 'defendant or defendants,' it is well established that removal generally requires unanimity among

[1] The Notice of Removal states that Plaintiff is diverse from every Removing Defendant in the Complaint, as required by 28 U.S.C. §§ 1332(a) and 1132(c). Although Maupintour Holding did not join in the Notice of Removal, it appears to be diverse from Plaintiff because it is a Nevada corporation.

[2] Plaintiff states that Maupintour Holding was served with the Complaint on July 19, 2005.

defendants." Barkley v. City of Phila., 169 F. Supp. 2d 346, 347 (E.D. Pa. 2001)(citing Balazik v. Co. of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995)); *see also* Green v. Target Stores, Inc., 305 F. Supp. 2d 448, 449 (E.D. Pa. 2004)("Although [28 U.S.C. § 1446] does not explicitly require that all defendants join the removal petition, under the rule of unanimity, in multiple defendant cases all must join in the removal petition."). "The Third Circuit has stated that 'failure of all defendants to join in removal is a 'defect in removal procedure.'" Id. (quoting Balazik, 44 F.3d at 213). As previously mentioned, there was no unanimity in the instant case among all of the Defendants because Maupintour Holding did not take part in the removal petition. The Removing Defendants do not dispute the unanimity requirement, but argue that they are exempt from the unanimity requirement because Maupintour Holding was fraudulently joined.

A. Fraudulent Joinder

1. Standard

"The unanimity rule . . . is not applicable with respect to any defendant who has been fraudulently joined." In Re Diet Drugs, 220 F. Supp. 2d 414, 419 (E.D. Pa. 2002)(citing Balazik, 44 F.3d at 213 n.4). The Court of Appeals for the Third Circuit has stated the applicable fraudulent joinder standard:

> Joinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment. But, if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court. Furthermore . . . where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims

> or defenses.
>
> In evaluating the alleged fraud, the district court must focus on the plaintiff's complaint at the time the petition for removal was filed. In so ruling, the district court must assume as true all factual allegations of the complaint. It also must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff.

Batoff v. State Farm Ins., Co., 977 F.2d 848, 851-52 (3d Cir. 1992)(internal quotations and citations omitted). "This jurisdictional inquiry into a plaintiff's allegations is less searching than the analysis applied under Fed. R. Civ. P. 12(b)(6) for failure to state a claim." Moorco Intern'l, Inc. v. Elsag Bailey Process Automation, N.V., 881 F. Supp. 1000, 1003 (E.D. Pa. 1995)(citation omitted). "Importantly, though, [the] inquiry must not be too deep." Lyall v. Airtran Airlines, Inc., 109 F. Supp. 2d 365, 367 (E.D. Pa. 2000). "Simply because we come to believe that, at the end of the day, a state court would dismiss the allegations against a defendant for failure to state a cause of action does not mean that the defendant's joinder was fraudulent." Id. at 367-68 (citing Batoff, 977 F.2d at 852). "In this context, our familiar standards of analysis under Fed. R. Civ. P. 12(b)(6) are inapplicable and, instead, the test is whether the plaintiff's claims are not even 'colorable,' which is to say, 'wholly insubstantial and frivolous.'" Id. (citation and footnote omitted). If the determination of whether the claim is colorable entails "a penetrating or intricate analysis of state law . . . then it is likely that the claim is indeed colorable and not frivolous." Id. (citation and footnote omitted).

2. Analysis

Removing Defendants assert that Maupintour Holding was fraudulently joined in this action because no reasonable basis in fact or colorable ground supports the City of

Philadelphia's claims against it. According to the Removing Defendants, there is no possibility that a Pennsylvania court would find that the Plaintiff's Complaint states a cause of action against Maupintour Holding. Relying upon an affidavit by Maupintor Holding's General Manager, Jeff Cohen, the Removing Defendants argue that Maupintour Holding does not, and has not ever, made hotel reservations for consumers at Philadelphia hotels.[3] (Defs.' Mem. Law Opp'n Pl.'s Mot. Remand at 8). Specifically, the affidavit states that "Maupintour Holding did not enter into any transactions with any Philadelphia hotels which raise the hotel tax issue described in the complaint." (Id., Ex. A ¶ 5). In support of its Motion for Remand, the City of Philadelphia provides copies of pages from the website of Maupintour, LLC ("Maupintour LLC"), a wholly-owned subsidiary of Maupintour Holding, which establish that Maupintour LLC offered escorted all-inclusive tour packages which included visits to the City of Philadelphia involving hotel stays. In relation to these copies of the website pages, Jeff Cohen's affidavit includes a statement that "Maupintour, LLC is a distinct business entity from Maupintour Holding, LLC, and is not a defendant in this action."[4] (Id., Ex. A ¶ 6).

In response to Jeff Cohen's affidavit, Plaintiff points out that the affidavit does not state whether Maupintour Holding rented hotel rooms in Philadelphia indirectly through any

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[3] In limited circumstances, "the Court [may] reach outside the pleadings to consider an affidavit that completely divorce[s] the challenged defendant from the allegations and [leaves] no doubt that the defendant was improperly joined." Vogt v. Time Warner Entm't Co., No. 01-905, 2001 WL 360058, at *1 (E.D. Pa. Apr. 3, 2001)(citing Lyall, 109 F. Supp. 2d at 368 n.8).

[4] Jeff Cohen's affidavit does not state the business relationship between Maupintour Holding and Maupintour LLC. Plaintiff asserts, and provides evidence, that Maupintour LLC is a wholly-owned subsidiary of Maupintour Holding. Apparently, Maupintour LLC is either a New York or Nevada corporation and, as such, is diverse and would not have any affect on diversity of citizenship.

related or affiliated entities, does not disclose the relationship between Maupintour Holding and Maupintour LLC, and fails to speak to whether Maupintour Holding rented rooms through its wholly-owned entity, Maupintour LLC. According to the Plaintiff, "[d]iscovery in this action will shed further light on defendant Maupintour Holding's hotel rental activities in Philadelphia, including its relationship with Maupintour LLC. Such discovery may cause Plaintiff to add Maupintour LLC as a named defendant." (Pl.'s Rely at 6 n.7).

Cognizant of the premise that removal statutes are to be strictly construed, and mindful of the heavy burden of persuasion in making a showing of fraudulent joinder, I find that the joinder of Maupintour Holding was not fraudulent. If this case was originally filed in this Court, the question of Maupintour Holding's corporate relationship with Maupintour LLC would be explored through discovery. Although Plaintiff's Complaint names Maupintour Holding as a defendant, and does not include allegations against Maupintour LLC, I am reluctant to conclude that Plaintiff's claims against Maupintour Holding are "wholly insubstantial and frivolous." Assuming as true all of the factual allegations of the Complaint, and knowing that if there is a possibility that a state court would find that the Complaint states a cause of action against Maupintour Holding I am required to find that joinder was proper and remand the case to state court, I cannot conclude that Maupintour Holding was fraudulently joined.

Mindful of the limited level of scrutiny applicable to a fraudulent joinder analysis, I cannot consider the merits of Plaintiff's Complaint nor may I analyze the corporate relationship between Maupintour Holding and Maupintour LLC. Applying the fraudulent joinder principles to the instant action, there is a possibility that the state court would find that the Complaint states a cause of action against Maupintour Holding. Thus, if there is even a possibility that a state

court would find that the complaint states a cause of action against any one of the defendants at issue, the federal court must find that joinder was proper and remand the case to state court. Batoff, 977 F.2d at 851. Consequently, Plaintiff's joinder of Maupintour Holding was proper. The Removing Defendants' failure to obtain the consent of Maupintour Holding in the Notice of Removal was a defect in removal procedure under 28 U.S.C. § 1447(c) and, as a result, the Plaintiff's Motion for Remand is granted.[5]

An appropriate Order follows.

[5] The Removing Defendants assert that even if Plaintiff has stated claims against Maupintour Holding, it nevertheless was improperly joined. According to the Removing Defendants, the claims against Maupintour Holding do not arise out of the common factual background with, or the same transaction, occurrence, or series of transactions or occurrences as the claims against any Removing Defendant and do not give rise to common questions of law or fact affecting the liabilities of Maupintour Holding and any other Removing Defendant. Plaintiff responds to this argument by stating that its claims against Maupintour Holding raise precisely the same factual and legal questions as are raised against all of the other Defendants. Additionally, Plaintiff asserts that "[e]ven [if] it is proven that defendant Maupintour Holding did not rent hotel rooms in Philadelphia through an online website, but only rented hotel rooms in Philadelphia through its wholly-owned subsidiary, Maupintour LLC, as part of tour packages, the central question of whether it paid full amounts of hotel taxes owed to Plaintiff remains the same." (Pl.'s Reply at 6). I find the Removing Defendants' argument regarding improper joinder meritless because the allegations in Plaintiff's Complaint against Maupintour Holding raise the same factual and legal questions as the claims asserted against the Removing Defendants.

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ORDER

AND NOW, this 11th day of October, 2005, upon consideration of Plaintiff's Motion for Remand (Doc. No. 7), and the Response and Reply thereto, it is hereby

ORDERED that the Motion is **GRANTED.**

IT IS FURTHER ORDERED that this case is **REMANDED** to the Court of Common Pleas of Philadelphia County.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly, Sr. J.